

No. 7084

IN THE
United States
Circuit Court of Appeals
For the Ninth Circuit

CHAS. H. LILLY CO., a Corporation, WILMOT H.
LILLY, KASENO PRODUCTS CO., a Corpora-
tion, and GEORGE F. LINQUIST,

Appellants,

vs.

I. F. LAUCKS, INC., a Corporation,

Appellee.

Upon Appeal from the District Court of the United
States for the Western District of Washington,
Northern Division.

Second Answering Brief of Appellee

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Second Answering Brief of Appellee

I. INTRODUCTION.

We will continue to adopt the same character of references as was adopted by both the Appellants and Appellee in their opening briefs.

While the Reply Brief of Appellants contains many inaccurate and misleading statements unsup-

ported by the record, it will serve no good purpose to categorically itemize the same. During our argument we will from time to time direct the Court's attention to the more flagrant of these errors.

It will be observed that in the Appellants' Reply Brief in this case, the same as in their Reply Brief in Cause No. 7083, no practical attempt has been made to answer the authorities cited by the Appellee in his Answering Brief.

II. ARGUMENT.

1. Intent and Burden of Proof—Admission of Intent by Appellants.

On page 36 of their Reply Brief Appellants make the following statement:

“Appellants have never contended that they did not know Kaseno Products Co. was making glue nor that they did not intend that the soya bean flour furnished should be used in making glue. The application of the rule contended for by Appellee would simply result in the inferring of an intent which was never denied to have existed, namely, an intent to furnish for glue making purposes.”

This admission on the part of the Appellants is in keeping with the findings of the Trial Court, where, in the Memorandum Decision, the Court states (R. 154):

“The stipulation and letters show that it was the intent of these defendants that the article

sold by them should be used in the manufacture by their co-defendants of the product of plaintiff's inventions."

2. Scope of "Johnson" Patent.

As shown in Appellee's Second Answering Brief in Cause No. 7083:

"The invention of the 'Johnson' patent was and is the discovery by the patentee that soya bean residue (that is, the whole residue of the soya bean after the oil has been extracted) may be used as an adhesive base. In other words, the patentee discovered *a new adhesive base* * * *. The result of this discovery was the foundation of a new industry."

The claims of the "Johnson" patent covered broadly the use of the whole residue of the soya bean, after the oil had been extracted, when finely ground, and the same used as an adhesive base for the manufacture of adhesives or glues. Therefore, any one who manufactured, used or sold a glue or adhesive which used the finely ground residue of soya bean as its adhesive base, infringed the claims of the "Johnson" patent.

The Trial Court stated in its Opinion (R. 126):

"Defendants further contend that the patent is void because of lack of invention in view of the known state of the art and that it was directly anticipated by certain patents and publications. * * *"

After several pages of considering the prior art stressed by the Appellants, he came to the conclusion that none of the said prior patents or prior publications did anticipate the patent in suit.

As we have heretofore stated, the Trial Court found that none of the claims in suit of the "Johnson" patent in Cause No. 7083, had been anticipated by the teachings of the prior art, and it will be observed that the Trial Court did not find one single claim in suit of the "Johnson" patent, invalid; nor did he make any attempt to restrict or circumscribe the discovery which the patentee of the "Johnson" patent claimed as new and patentable.

Therefore, it follows broadly that the use by the Kaseno Products Co. of the finely ground residue of the soya bean as an adhesive base was an infringement of every claim in suit of the "Johnson" patent. (Claim 8 was not in suit and was held invalid.) This is borne out by the finding of the Trial Court, where he says (R. 154):

"The stipulation and letters show that it was the intent of these defendants that the articles sold by them should be used in the manufacture by their co-defendants of the product of plaintiff's inventions."

Claims 3 and 7 of the "Johnson" patent, found by the Trial Court to be specifically infringed, used

the finely ground residue of the soya bean as their glue base.

3. The Sale of Glue Base of Appellee's Patented Combination a Wrongful and Tortious Act.

The Trial Court found (R. 154) that such use by the Kaseno Products Co. constituted a wrongful and tortious act. The Trial Court further found that the Appellants *intended* that the article sold by them should be used in the manufacture of this infringing article and therefore the Trial Court found that the furnishing of the finely ground residue of the soya bean, i. e., soya bean flour, by the Appellants was a wrongful and tortious act. The finding of the Trial Court determined the nature and character of the acts performed by the Kaseno Products Co., as to its use of the finely ground residue of the soya bean as an adhesive base, prior and subsequent to the commencement of the "Johnson" suit, and finds that all of such acts were wrongful and tortious. The Trial Court then goes a step further and finds that it was the intent of "Appellants Lilly and Lilly Co." that the article then sold by them, i. e., soya bean flour, to Kaseno Products Co., should be used by the Kaseno Products Co. in carrying out its wrongful and tortious act, and judicially determined that the acts of the Appellants in so doing constituted a tortious and wrongful act.

There can now be no contention raised that this finding of the Trial Court was incorrect for the Appellants on page 36 of their Reply Brief, as hereinabove quoted, specifically say they intended at all times that the soya bean flour furnished by them to the Kaseno Products Co. should by the Kaseno Products Co. be used in making glue. Therefore, it follows that the Appellants intended to perform a tortious and unlawful act prior to the commencement of the "Johnson" suit, which tortious and wrongful act at all times continued down to the day of the finding of the Trial Court in its Memorandum Decision on June 15, 1932. This admission is found on pages 31 and 32 of their Reply Brief, where they say that the Appellee was wrong in charging the Appellants with continuing their wrongful and tortious acts until the day of the issuance of the injunction, but state that they ceased furnishing soya bean flour to Kaseno Products Co. as soon as the Memorandum Decision was filed. Both of these statements were outside the record. If the facts stated by the Appellants are true, then the statement of Appellee is in error to the extent of 26 days, the Memorandum Decision having been filed on June 15, 1932, and the Decree having been signed on July 11, 1932. Suffice it to say that the admission of the Appellants brings the performance of their tortious and wrongful acts down to the day of the sign-

ing of the Findings of Fact and Conclusions of Law by the Trial Court.

It must further be remembered that the Appellants are not on this appeal questioning the validity of any of the claims of the "Johnson" patent. Therefore, the Court for the purpose of this appeal must now consider every claim of the "Johnson" patent placed in suit as valid. The Trial Court found that none of them in suit had been anticipated. This Court should conclude (a) because of the finding of the Trial Court, and (b) because of the admissions of the Appellants as shown on page 36 of their Reply Brief, that the Appellants at all times had the *intent* to furnish to the Kaseno Products Co. soya bean flour ground to glue specifications, for the purpose of manufacturing a glue, and that in view of the formulae used by Kaseno Products Co. (see Second Answering Brief, Cause No. 7083, p. 23) every pound of such glue which used the soya bean flour so furnished as a glue base infringed every claim of the "Johnson" patent placed in suit.

4. "Damaging Force" Was Wrongful Sale of Soya Bean Flour for a Glue Base.

Therefore, the *intent* having been determined both by judicial finding and by admission of the Appellants, they were at all times committing a wrong-

ful and tortious act in the furnishing of such soya bean flour to Kaseno Products Co. for the manufacture of a glue. Such furnishing of soya bean flour to Kaseno Products Co. was wrongful, and by so furnishing the same the Appellants put into motion a "damaging force." Appellants attempt to answer the argument of the Appellee in this regard, found in the Answering Brief of the Appellee on pages 50 to 57, by saying (Reply Brief, pp. 57-61) that soya bean flour in itself was not of such physical nature as was possible to constitute a damaging force, and therefore the law of the "*Squib*" case and subsequent authorities was not applicable. The force of this argument scarcely commands sufficient dignity to necessitate an answer. Such character of argument does not meet the issue head-on—it ignores authorities. It is merely a weak attempt to avoid the issue.

Appellants take exception to the term "damaging force", but this term is used by the Circuit Court of Appeals, 7th Circuit, in an infringement patent suit in the authorities cited in Appellee's First Answering Brief, page 44, in the same sense as used by the Appellee in its argument.

It is the nature and character of the act, coupled with the physical matter involved, that constitutes the damaging force. Here the furnishing of the soya bean flour to the Kaseno Products Co. alone made possible

the commission of the tortious and wrongful acts of the Kaseno Products Co. The Kaseno Products Co. could not have made its infringing glue without the soya bean flour. As stated by Mr. Linquist (R. 215-216) from 1924 to 1929 the glue manufactured by the Kaseno Products Co. contained at least 52% soya bean flour and in certain of the formulae the soya bean flour used in the glue base was as high as 96%. The furnishing of this soya bean flour to the Kaseno Products Co. with the intent that it should be made into glue was the tortious and wrongful act, and was the "damaging force" set into motion by Appellants, and was so set in motion knowingly and intentionally, and with the further intent that it should be so wrongfully used.

5. Appellants Legally Presumed to Have Intended All the Legal Consequences of Their Acts.

True, Appellants now state that at the time of furnishing such flour they only intended that it should be used in the making of a glue; that they did not know that the making of such glue was a wrongful thing. But this argument does not avail them anything. As cited in our First Answering Brief (p. 44), the Circuit Court of Appeals for the 2nd Circuit, in reversing the lower court, said:

"Doubtless defendant did not think it would infringe by buying where it did, but it is legally

*presumed to have intended all the legal consequences of what it did. This suit is one of those consequences. * * **

Mueller Co. vs. A. Zeregas Sons, 12 Fed. (2d) 517, 519 (C. C. A. 2).

The Trial Court has found that the thing that they did do was at the time of its doing a wrongful thing. Therefore, it was wrong at the time they did it. Appellants say they intended to do the act but they did not know it was wrongful. Morally, this argument might have some force, if the Appellants had ceased the commission of such wrongful acts after having been advised of the wrongful nature and character of the acts by the Bill of Complaint served upon them in Equity Cause No. 7083. This they did not do. Appellants attempt to waive this aside by saying, (a) that a bill of complaint served upon them charging them with wrongful acts did not constitute notice; (b) that the writing to them of the letter by the Appellee under date of November 16, 1928 (R. 108) did not constitute notice, although in said letter they were notified of the issuance of the "Carbon Bisulphide" and "Caustic Soda" patents and charged with the further knowledge that this letter was written as a legal notice under the advice of counsel, that the rights of the Appellee under these patents would be protected, and that the Appellee would have recourse to due process of law to enforce these rights against

unlicensed manufacturers, sellers and users of glue embodying the inventions covered by the above identified patents, and against all contributory infringers.

We submit that the fact of the sending of this letter, coupled with the fact that the Appellants had been sued for contributory infringement under the "Johnson" patent constitutes such full and complete notice to the Appellants that, the further sale by them of soya bean flour to the Kaseno Products Co. with the intent that it be used as a glue base, would make them liable as contributory infringers of said patent, and would deprive them of any excuse on the ground of lack of knowledge. They are legally presumed to have intended all the legal consequences of their act.

But carrying the matter a step further, after the serving of the Bill of Complaint in the case at bar, wherein they were actually charged with their unlawful acts, Appellants still do not cease the commission of such wrongful acts, but continue in their performance until the day of the signing of the Memorandum Decision, to-wit, June 15, 1932. Appellants attempt to avoid the legal consequences of such act by saying that they relied upon the sworn answer to the Bill of Complaint signed by Mr. Linqvist of the Kaseno Products Co. wherein it was stated that the Kaseno

Products Co. was not infringing the claims of the "Carbon Bisulphide" and "Caustic Soda" patents.

As cited in our First Answering Brief (p. 44) the Circuit Court of Appeals for the 2nd Circuit, in reversing the Lower Court, said:

"Doubtless the situation is annoying, perhaps even distressing, for defendant; but if persons who put faith in manufacturers of infringing articles are to be protected by their faith from accounting to the real owners of what they buy, a very easy path is open for the aborting of most patent suits."

Mueller Co. vs. A. Zeregas Sons, 12 Fed. (2d) 517, 519 (C. C. A. 2).

Appellants say they are "honest" men. They say that they must have presumed that the Kaseno Products Co. and Mr. Linquist were "honest" men; and "Appellants Lilly and Lilly Co." being thus "honest" men, they could not doubt the honesty of the Kaseno Products Co. in its answer to the Bill of Complaint, when it alleged it was not infringing the claims of the "Caustic Soda" and "Carbon Bisulphide" patents. Irrespective of these protestations of honesty, the record discloses that the Appellants did not take any step nor perform a single act which would have advised them of the nature and character of the glue business being conducted at that time by the Kaseno Products Co. They content themselves with showing (pp. 28, 52, Reply Brief) what they *might* have done

and what *might* have been the information that they *might* have received if they had done anything. Such character of argument is not persuasive. The fact of the matter is that the Appellants did not do anything to advise themselves concerning the alleged infringement of the patents in suit. One cannot numb his senses, when his senses should have been active, and then claim protection of a court of equity to protect him because of his failure to have used his senses. And that is exactly what the Appellants are here seeking to do.

The Appellants throughout pages of their Reply Brief continuously protest their honesty and in proof of the existence of such honesty they say they ceased their wrongful acts as soon as the Trial Court found their acts were unlawful (p. 66, Reply Brief). It must be remembered that the Kaseno Products Co. and George F. Linquist are not appealing. As to them the Decree is final. They are adjudicated wrong-doers. If, as Appellants state, they were honest in their belief that the furnishing of the soya bean flour to the Kaseno Products Co. for glue making purposes was not originally a wrongful act on their part, and that the Kaseno Products Co. in using the same was not committing a wrongful act, certainly it must follow that honest men, having now discovered that what they did was wrongful, ought at the earliest possible

moment take some steps to right such wrong and to return to the one wronged the consideration which the honest man now finds that he wrongfully took. And further, that the honest man would willingly agree that he should immediately cease the further commission of such wrongful acts. How do Appellants measure up to this rule of common honesty. They are in this Court admitting that they furnished the soya bean flour with the intent that it be used for glue-making purposes. They are in this Court saying that the acts of the Kaseno Products Co., because of the Decree now final against Kaseno Products Co., in using such flour in the manufacture of glue were wrongful. Appellants are admitting that they manufactured this soya bean flour for glue-making purposes to the extent of 150 tons per month, to their own very great profit. And yet they are contending and seeking to have this Court of Equity relieve them from paying back to the Appellee any portion or part of such wrongful profits by them received from the commission of such wrongful act. And they are seeking to have this Court of Equity nullify the injunction of the Trial Court prohibiting them from further continuing with their wrongful and unlawful acts. It would seem that such conduct is scarcely in harmony with the protestations of honesty concerning which reference is so frequently made in the pages of their Reply Brief.

The "Carbon Bisulphide" and "Caustic Soda" patents are subsidiary to the "Johnson" patent to the extent that they use soya bean flour as their glue base. Therefore, the wrongful intent of the Appellants carries through into the "Carbon Bisulphide" and "Caustic Soda" patents, in that the soya bean flour admitted to be furnished (p. 36, Reply Brief) to the Kaseno Products Co. was for the purpose of making a glue.

Note well that the "Caustic Soda" patent secures to the Appellee the exclusive right to the use of caustic soda with a soya bean glue base to make a glue. The use of soya bean in any glue base would, of course, be subsidiary to "Johnson", that is, one to legally use soya bean as a glue base must either own the "Johnson" patent or have a license thereunder. "Johnson", of course, had no right to the use of the chemical caustic soda. Appellee owning both the "Johnson" and "Caustic Soda" patents had the legal right, of course, to use both. The same reasoning applies to the use of the chemical carbon bisulphide in conjunction with soya bean as a glue base.

The wrongful intent now being admittedly present, any escape from Appellants' liability as to the legal consequences of this wrongful act which they intended to do, must be for them to furnish. In other words, having admitted the intent to aid and assist

the Kaseno Products Co. in making a soya bean flour base glue by furnishing to them the soya bean flour with which to make it, all of which acts on the part of the Kaseno Products Co. have been determined finally to have been wrongful and tortious, places upon the Appellants the burden of showing an excuse or reason why they should not be held to answer for the legal results of such aiding and assisting in the carrying out of such wrongful act. It will also be noted that the Trial Court (R. 154), after having found the general intent of the Appellants to be that the article, i. e. soya bean flour, sold by them was to be used in the manufacture by their co-defendants of the product of Appellee's inventions, then states (R. 155) :

“These defendants have *also* infringed the claims of the three patents which have been held valid and infringed by the other defendants.”

Appellants in their argument throughout their entire Reply Brief utterly ignore the legal effect of their original admitted intent to aid the Kaseno Products Co. in the commission of what the Trial Court has now found to be a wrongful act. Having had the original intent to aid, assist and contribute to the wrongful act, that general intent, having so been found and admitted, places upon them the burden of showing any excuse or reason why they should not be held to answer to the full extent of the legal liability by

them incurred in so aiding, assisting and contributing to the commission of such unlawful act.

As was stated in our First Answering Brief (p. 36):

“It being established that defendant is offering for sale articles, intending them to be used in combinations which, if unlicensed by complainant, would be infringements of complainant’s patents, we think that it is the *duty of the defendant to see to it that such combinations which it is intentionally inducing and promoting shall be confined to those which may be lawfully organized. We are unable to see why any different rule should be applied in such case from that applicable to a case in which a defendant makes a patented machine to order. He may make such a machine upon the order of the patentee or a licensee, but not otherwise. Upon him is the peril of a mistake as to the lawful authority of him who gives the order.*”

Thomson-Houston Electric Co. vs. Ohio Brass Co., 80 Fed. 712, at 721.

In determining the question of the burden of proof it is necessary to go back to the very inception of this matter and to determine (a) what was the original intent of the Appellants and (b) were the acts of the Kaseno Products Co. in which the Appellants aided and assisted at all times wrongful? Note well, all the acts of the Kaseno Products Co. in relation to its use of soya bean flour as a glue base have been held to be wrongful and tortious and it has not appealed. The Decree as to it is final. Further, let it

be well noted that the Appellants have on page 36 of their Reply Brief admitted that they at all times intended that the soya bean flour which they were selling to the Kaseno Products Co. was by the Kaseno Products Co. to be used in the manufacture of soya bean glues. Therefore, the conclusion is irresistible that the Appellants intended at all times to aid and assist the Kaseno Products Co. in the perpetration of a wrongful and tortious act, that is, the manufacture of soya bean flour base glues.

Having therefore had this general intent to aid and assist in the making of soya bean flour base glues, they must now be presumed to have the intent that it, i. e., the soya bean flour base, should have been used in any kind or character of soya bean flour base glues that the Kaseno Products Co. was making. The whole intent includes a lesser part. The record is absolutely silent as to any steps taken by Appellants to determine whether or not the Kaseno Products Co. had any license or other legal rights to manufacture caustic soda or carbon bisulphide glues. This duty was upon the Appellants and they acted at their peril, as set out in the *Thomson-Houston Electric Co. vs. Ohio Brass Co.* case, 80 Fed. 712, to which they subscribed (quoted on page 36 of Appellee's First Answering Brief), where the Court stated:

“* * * It being established that defendant is offering for sale articles, intending them to be used

in combinations which, if unlicensed by complainant, would be infringements of complainant's patents, we think that it is the *duty of the defendant to see to it that such combinations which it is intentionally inducing and promoting shall be confined to those which may be lawfully organized.*"

Therefore, the admitted intent of the Appellants fixes definitely their status, and the burden was not upon the Appellee to have shown that there were no non-infringing uses to which the soya bean flour sold by the Appellants to the Kaseno Products Co. might have been put. That was purely a defense, a matter of excuse or reason why the Appellants should not be held answerable because of their original intent to aid and assist in the commission of a wrongful act. The fallacy of Appellants' reasoning in this regard is that they do not take into consideration the adjudication of the legal status of the acts of the Kaseno Products Co. Those acts were just as wrongful when committed as they were on the 15th day of June, 1932, when the Trial Court filed its Memorandum Decision, because in that Memorandum Decision the Court found that these acts were at all times wrongful.

To our minds the only construction that can be drawn from the position taken by the Appellants, both in their Opening and Reply Briefs, is that if the burden were upon them to have shown any excuse or reason why they should be relieved from their lia-

bility for having aided and assisted in the wrongful acts of the Kaseno Products Co., then they have failed because, they say, there was no such evidence in the record of such excuse or reason. They say the burden was upon the Appellee to have inserted in the record such evidence, and because it is not there the Appellants should escape the legal liability of their acts.

As we have heretofore stated, the fallacy in this whole argument of Appellants is that they absolutely refuse to take into consideration the full legal effect of their admission contained on page 36 of their Reply Brief and the findings of the Trial Court as to the presence of the original intent, and that that original intent has now by the Court been found (in holding Kaseno Products Co. guilty as a direct infringer) to have been an intent to aid and assist in the doing of an unlawful act.

We respectfully submit to this Court that the admissions of Appellants as to intent (p. 36, Reply Brief), plus the finding of the Court as to the matter of original intent, plus the now adjudicated fact that the acts of Kaseno Products Co. were wrongful—in which acts the Appellants admittedly aided and assisted—now definitely determine the status of these Appellants not only as of the date of the commission of the acts, but continuously down to the 15th day of June, 1932, as that of contributory wrong-doers. It

therefore being a fact that the Appellants were at all times guilty of aiding and assisting in the commission of a wrongful and tortious act, they cannot now escape their liability therefor unless they affirmatively show to the Court some definite avenue by which escape is possible. This, we respectfully submit, they have entirely failed to do. Apparently the Appellants in the trial of the case staked their entire case upon the likelihood of the patents being declared invalid. In this they were in error. Evidently so strong was their belief that the patents would be held invalid, they failed to attempt to provide for themselves any avenue of escape from their liability as contributory infringers, even if it had been possible for them so to do.

III. ANSWER TO CONTENTIONS OF APPELLANTS IN THEIR REPLY BRIEF.

We now very briefly direct the Court's attention specifically to the various headings of Appellants' Reply Brief.

1. Respecting Notice by "Attaching Tags to Patented Product" (p. 11, Reply Brief).

Appellants make no reference to the extract quoted in Appellee's First Answering Brief (p. 49) from the case of *Munger vs. Perlman Rim Corp.*, 244

Fed. 799, 805, affirmed 275 Fed. 21, wherein the Court said:

“Notice of the existence of the patent was given by the plaintiff by marking the manufactured product under the patent with the date of the patent. This was placed upon the wheels manufactured commercially by the Munger Vehicle Tire Company, and was sufficient notice within the meaning of section 4900 of the Revised Statutes.”

In their attempt to avoid the force of the notice to the world, by means of said tags, that the glue compositions in question were patented, they refer to the case of *Gimbel vs. Hogg*, 97 Fed. 791 (C. C. A. 3rd), which case, as we have stated in our Second Answering Brief in Cause No. 7083, related to a special statute respecting design patents, where knowledge was made a necessary element to be affirmatively found before the defendant could be held to have infringed. No such statute exists for patented compositions of matter.

2. Reply to Contention of Appellants Respecting “Appellee Published Notice of the Patents” (p. 12, Reply Brief).

It must be remembered that the Appellee’s main office is in the City of Seattle, where its factories are located. That a very considerable percentage of the veneer industry of the Northwest is tributary to the City of Seattle. The business of the Kaseno Products Co. was in the City of Seattle. The home of the Appellants is in the City of Seattle. It is admitted

that the Appellants knew that the soya bean flour they were selling to Kaseno Products Co. went into the glue industry. That Appellants were in very close touch with the veneer plants themselves because Mr. Lilly testified (R. 231):

“* * * we had been advised that certain of the veneer plants were going to make their own glues, and that we were desirous of selling soya bean flour to them for that purpose. * * * We had sent such samples, though.”

If anyone in the Pacific Northwest was apparently in touch with the veneer industry, so far as the same related to the furnishing of glue, surely such a one must have been “Appellants Lilly Co. and Lilly.”

The argument of Appellants is not very persuasive, where they say (p. 13. Reply Brief):

“It is submitted that the published notices printed in a publication not connected with Appellants’ business, which notices would not be likely to, and did not, come to Appellants’ attention, * * *.”

The record is replete with evidence that “Appellant Lilly Co.” was most actively engaged in the glue business, grinding an average of 150 tons per month for glue base, i. e., soya bean flour (R. 234), sending samples to all the veneer plants (R. 231), writing letters to all those interested (R. 228), selling soya bean flour for glue-making purposes throughout the United States (R. 225-232).

3. Reply to Contention of Appellants Respecting "Giving of Written Notice to Appellants" (p. 14, Reply Brief).

As we have heretofore stated, Appellants were given notice by the Bill of Complaint in the "Johnson" case, Equity Cause No. 7083; were actually given notice by registered mail of the issuance of the patents on November 16, 1928, which notice warned that contributory infringers would be sued. Certainly this constitutes notice to the Appellants that any soya bean flour thereafter sold to Kaseno Products Co., if used with caustic soda and/or carbon bisulphide, would constitute such wrongful use by the Kaseno Products Co. as would make "Appellant Lilly Co." liable as joint tortfeasor with the Kaseno Products Co. in event it was subsequently found that the acts of the Kaseno Products Co. constituted infringement. These notices placed a duty upon the Appellants to inquire and determine whether or not the soya bean flour which they were selling to Kaseno Products Co. as an adhesive base was being used by Kaseno Products Co. to infringe either of these two letters patent. The record is barren of any act or thing done by the Appellants in connection therewith. The law definitely places upon them a burden so to do. (See authorities hereinbefore cited.)

4. Reply to Contention of Appellants Respecting "Soya Bean Flour Standard Article of Commerce" (p. 16, Reply Brief).

This matter was answered at length in our Second Answering Brief in Equity Cause No. 7083. We will simply direct the Court's attention again to the fact that the Appellants are endeavoring to use the present tense rather than relating back to the time when soya bean flour was furnished the Kaseno Products Co. as a glue base, concerning which time we have shown by the admissions and statements of the Appellants themselves that soya bean flour at that time was a new product.

The Court here may well declare, as did the Court in *The Lyman Mfg. Co. vs. Bassick Mfg. Co.*, 18 Fed. (2d), 29, 38 (C. C. A. 6) (Cert. Den. 72 L. Ed. 420):

“* * * When defendants put out their pin fittings, nothing resembling them was upon the market excepting the plaintiff's which had come into such general use, as above stated. * * *.”

This authority was cited more fully, pages 60 and 61 of the First Answering Brief of Appellee in Cause No. 7083, to which Appellants have taken no exception in their Reply Brief.

Appellants here state that the Court “inferentially found” that soya bean flour was an article of

commerce. We respectfully direct the Court's attention to the finding of the Trial Court (R. 154):

"The foregoing is sufficient to show contributory infringement on the part of these defendants and to take the case out of the rule that one who sells to an infringer an article of commerce having ordinary uses unconnected with the product of the patent, without intent to contribute to the manufacture of such product, does not infringe. The stipulation and letters show that it was the intent of these defendants that the article sold by them should be used in the manufacture by their co-defendants of the product of plaintiff's inventions."

The Court here is making a statement of the rule and goes on to conclude, after stating the rule:

"The stipulation and letters show that it was the intent of these defendants that the article sold by them should be used in the manufacture by their co-defendants of the product of plaintiff's inventions."

Here the Court is holding that the article sold had a definite purpose for use, i. e., for the manufacture of glue, that being the product manufactured by the co-defendants, Kaseno Products Co. In other words, that it was a special product manufactured for a special use. Therefore, taking it "out of the rule that one who sells to an infringer an article of commerce having ordinary uses unconnected with the product of the patent * * *." Surely, this is the reasonable and proper construction of the Court's holding

as contrasted with the attempted strained construction of the Appellants that the Court “inferentially found” that soya bean flour was a staple article of commerce.

5. Reply to Contention of Appellants Respecting “Product Furnished by Appellants Was Specially Processed for Glue-Making Purposes” (p. 20, Reply Brief).

We think this matter is sufficiently covered in the two Answering Briefs in Equity Cause No. 7083.

6. Reply to Contention of Appellants Respecting “Soya Bean Flour Furnished Was Ground to Glue Specifications” (p. 22, Reply Brief).

Here Appellants take a new tact. They say that it just so “happens that this standard soya bean flour, ground to 100 mesh or finer, meets the requirements of ‘glue specifications.’ ” Therefore, the term “ground to glue specifications” can have no relation to flour ground to 100 mesh or better. It seems to us that the complete answer to this is the answer of Mr. Lilly himself (R. 232):

“Most of the soya bean flour we have sold since 1927 went into glue plants; that is, glue manufacturing concerns.”

(R. 228): “Approximately 150 tons is processed into flour each month * * *.”

Again the Arabol letters, where the Appellants stress the virtue of 100 mesh as being generally used

for glue making purposes, asserting that they do grind finer than 100 mesh and that the glue manufacturers prefer this finer mesh, but that they have been buying the 100 mesh inasmuch as it costs less (R. 106):

“This (100 mesh) is the grade that is in the greatest demand in this section of the country. * * * The various glue manufacturers seem to prefer the finer mesh, however they have been buying the 100 mesh inasmuch as the cost is less.”

Surely, this testimony of Mr. Lilly does not lend much force to the character of argument indulged in by Appellants under this heading.

7. Reply to Contention of Appellants Respecting “Linnquist Testimony as to the Use of Soya Bean Flour” (p. 24, Reply Brief).

This is merely a re-statement of the position taken by Appellants in their Opening Brief and was fully covered in our First Answering Brief.

8. Reply to Contention of Appellants Respecting “Appellant Lilly Co. Continued to Furnish Soya Bean Flour After Suit Started” (p. 26, Reply Brief).

This has already been covered in our First Answering Brief and in our Second Answering Brief in Equity Cause No. 7083 and in the argument in this brief already contained. The only new matter injected by Appellants is their rather specious argument that “Appellant Lilly Co.” “might well have assumed that

Kaseno Products Co. was making a glue from isolated soya bean protein" (p. 31, Reply Brief). And here they quote one question and answer from the testimony of witness Cone, wherein witness Cone says that from a theoretical standpoint, reasoning from analogy, one might believe that soya bean glue could have been made from soya bean protein. They omit to quote the very next question and answer of witness Cone, which are as follows (R. 254):

"Q. In practice have you found that true?

A. No, it is the other way around.

Q. Is there any instance that you know of where the isolated protein of seed residue flour has been used or is now being used in the commercial glue art?

A. I do not know of any such instance."

It is not believed that the character of incomplete quotation from the record by Appellants or the character of argument employed by them can be of very much assistance to the Court. This Court is not dealing with theories, nor suppositions. It is dealing with facts in the commercial world. Appellants admit that they sold an average of 150 tons of soya bean flour per month and that most of it was used as a glue base, and that Kaseno Products Co. was their largest single customer. There is not one single statement in this record that Kaseno Products Co. made a glue out of isolated soya bean protein. The only formula in which

a soya bean protein was ever used by the Kaseno Products Co. was one in which they used 10 parts of a so-called vegetable protein along with 65 parts of soya bean flour, and is the identical formula which the Court found in its findings of fact and conclusions of law embodied the making of an infringing glue. Furthermore, it must be remembered that the record discloses that isolated soya bean was not a standard article of commerce, even on the date of trial (Dr. Dunham's testimony, R. 251).

Testimony of witness Cone (R. 251):

“Q. Have you in your wide experience in the glue art, and in your visits to commercial plants throughout the United States, ever heard of or seen the use of an isolated vegetable protein for glue making purposes?”

A. I never have.”

Mr. Lauck's testimony (R. 243):

“Q. Do you know of any isolated vegetable protein ever having been used practically for glue?”

A. No, sir; I do not.

Q. Are isolated vegetable proteins easy to obtain, commercially?”

A. They are not articles of commerce at all. You cannot buy them on the market.”

This testimony stands uncontradicted in the record and yet the Appellants are seeking to have the Court relieve them of liability for their unlawful acts and for the enormous wrongful benefits which have

inured to them from the sale of 150 tons per month of soya bean flour on a statement in their Reply Brief that Appellants “might well have assumed that Kaseno Products Co. was making a glue from isolated soya bean protein,” and set this assumption up as a legal excuse to relieve them from their liability and permit them to keep to themselves the illegal profits of their wrongful acts.

9. Reply to Contention of Appellants Respecting “Accusation That Statements Made by Appellee in Its Answering Brief Were Not True” (pp. 31, 32, Reply Brief).

We have heretofore directed to the Court’s attention the fact that we did say in our Answering Brief that Appellants had continued their sale of soya bean flour as a glue base, which we asserted was wrongful, up until the date of the signing of the injunction. This, we there admitted, was outside of the record. We believed it to be true. Appellants now say they continued to sell soya bean flour up until the day of the signing of the Findings of Fact and Conclusions of Law, but stopped on that day. We were evidently in error twenty-six days, that being the difference between the date of the signing of the Findings of Fact and the signing of the Decree. This error in date does not for one moment lessen the culpability of the Appellants in continuing the use of

soya bean flour as a glue base after all the evidence in the trial had been had and pending the ultimate decision of the Court. Surely, during this period of time Appellants must have had notice and must have been charged with knowledge of the nature and character of their wrongful acts, but still they did not desist. Surely, such conduct shows a deliberate and determined attempt to continue their sale of soya bean flour as a glue base and to reap up to the very date of the decision of the Trial Court all the benefit and profit for themselves as were possible for them to do before being stopped by the Court. That was the reason for referring to their continued acts. Counsel has admitted that the Appellants so did do up to the date of the decision of the Trial Court.

In our First Answering Brief No. 7084, page 47, we cited *Orr-Ewing vs. Johnson*, 13 Ch. D. 434, 553, to the effect:

“However honest or inadvertent the original mistake may have been, a continuation of the use of it after that (infringement) was pointed out is itself sufficient evidence of a fraudulent intention.” (Insert ours.)

10. Reply to Contention of Appellants Respecting “Conversation Between I. F. Laucks and Wilmot H. Lilly” (p. 32, Reply Brief).

This has been fully answered both in our First Answering Brief and in the Second Answering Brief

in Equity Cause No. 7083, and nothing further here need be added except to comment upon the statement of counsel that at the time of the conversation, being subsequent to the commencement of the "Johnson" suit, that "Appellants did not know such fact. Appellee was in position to know the fact; Appellants were not." Our query is why? Their relations with the Kaseno Products Co. surely were very close. Has there been any reason suggested in this record or by Appellants in their Reply Brief as to why they could not have gone to the Kaseno Products Co. and ascertained every step that the Kaseno Products Co. was taking? Why should Appellants now base any argument in this Court upon their statement that "Appellants did not know such fact. Appellee was in position to know the fact; Appellants were not." Surely, such character of argument cannot be very persuasive. This and similar statements we have quoted show to what length Appellants are going in order to escape the liability for their unlawful acts.

11. Reply to Contention of Appellants Respecting "Most Conspicuous Use" (p. 33, Reply Brief).

Nothing new has been added under this heading and no attempt has been made to answer the authorities cited by Appellee in its Opening Brief, except to comment on the *Dick* case, wherein they say the opinion of the Court must have been *obiter dic-*

tum. If the holding of this Court was *obiter dictum* and there were any authorities to the contrary, naturally one would expect to have found citations. None is cited. The authorities cited by Appellee in its Opening Brief must be taken to be the law.

12. Reply to Contention of Appellants Respecting "Insufficiency of Assignments of Error" (p. 36, Reply Brief).

There is nothing in this portion of Appellants' Reply Brief which differs from their position taken in Equity Cause No. 7083, and further comment on the matter will not now be made except that the assignments of error on which Appellants say they have a right to rely in support of the specifications of error in their Brief as to non-infringing glues, are Assignments 12, 13 and 14.

Assignment No. 12 has to do wholly with error predicated upon the Court's finding of fact and conclusion of law that the stipulation made by the Appellants and the two Arabol letters were sufficient to show contributory infringement on the part of these Appellants.

Assignment No. 13 alleges error on the part of the Court in finding that the stipulation and the two

Arabol letters were sufficient to take the case out of the rule that "one who sells to an infringer an article of commerce having ordinary uses unconnected with the product of the patent, without intent to contribute to the manufacture of such product, does not infringe."

Assignment No. 14 charges the Court with error in finding or concluding that the stipulation and the two Arabol letters showed that it was the intent of these defendants that the article sold by them should be used in the manufacture by their co-defendants of the product of plaintiffs' inventions.

As to Assignment No. 14, it will be noted that the admissions of the Appellants (p. 36, Reply Brief) fully support the finding of the Trial Court.

It is difficult to understand how an assignment of error can be maintained when the Appellants themselves, by written admissions, admit the very facts upon which error is predicated. It is on this very ground of intent that they seek to justify their right to maintain their specification of error contained in their Brief as to non-infringing glues. All comments made in the Second Answering Brief of Appellee in Equity Cause No. 7083 on this point are by reference made a part hereof.

13. Reply to Contention of Appellants Respecting "Assignment of Error Regarding Awarding of Costs Not Sufficient" (p. 44, Reply Brief).

Appellants in this reply to contention of Appellee set forth in our First Answering Brief have not seen fit to answer any of the authorities cited by Appellee. Therefore, these authorities must be taken to be the law. In our Answering Brief we pointed out that Appellants cited no case where costs were denied where the disclaimer *did not strike out a claim*, and that still stands true. Appellants have not cited to this Court one single case where costs have been disallowed except cases where a claim was stricken out by the disclaimer. In the case at bar there has been no attempt to disclaim any of the claims of the "Caustic Soda" patent. The disclaimer was filed merely for the purpose of striking from the specifications such matter as had no connection whatsoever with the inventions covered by the claims.

Note well that each and all of the claims of the "Caustic Soda" patent specify and describe the glue base as being a *flour*, either a soya bean flour which contains protein as one of its many elements, or a vegetable flour containing as one of its many ingredients, protein. Appellants made extended argument on the distinction of the terminology in the claims wherein, in some claims the term "the reaction prod-

ucts of the soya bean flour" occurs, and claims where this is omitted. The Court's attention is directed to the fact that the term "reaction products" occurs in the *composition* claims and does not occur in the *process* claims. The reason for this will now appear.

Appellants seem to be entirely unfamiliar with the Patent Office practice relating to the use of the term "reaction products." In defining a composition of matter resulting from the chemical interaction of several ingredients such as A, B, C, and D, the Patent Office requires the use of the term "reaction products" in the titular part of the claim. Obviously, after the reaction occurs the ingredient in the form and character of A is no longer A, and B is no longer B, etc. The chemical change which has created the new composition has transformed them and the identity of the separate ingredients is lost in forming the new composition of matter. Therefore, it would not be accurate to say, for example, "I claim a vegetable glue composition comprising soya bean flour and an alkali metal hydroxide as such in an aqueous medium." The reason it would not be true is because *in the composition* the flour has lost its identity as flour, and the alkali metal hydroxide is no longer alkali metal hydroxide. Therefore, the Patent Office, in the interest of precision and accuracy, requires in the defining of claims relating to *composition of matter*,

the use of the term "the reaction products of." And thus, whatever changes may take place between the original ingredients after the chemical reaction, the composition resulting is accurately defined as being the reaction products of said change.

On the other hand, in the case of *process claims*, this requirement of the use of the term "the reaction products of" is not necessary, because the process claims deal with the method of making the new composition of matter, that is, they deal with the ingredients at a point of time prior to the change, that is, prior to the chemical interaction. Hence they deal with the ingredients while they still retain their original character which denominates them as A, B, etc. The process claim referred to by Appellants states:

"The process of making a vegetable glue which comprises treating soya bean flour with Caustic

Soda as such in an aqueous medium, * * *."

Manifestly, the instant of adding the caustic soda to the soya bean flour the said soya bean flour is still soya bean flour, and the caustic soda is still caustic soda. But the instant after the adding, and the reaction between the ingredients has occurred, then the new composition of matter can only be described as comprising the "reaction products of." Thus we have the distinction between the terminology in the titular part of composition claims and process claims in ques-

tion. The failure on the part of the Appellants to understand this distinction manifestly accounts for their wrong deductions, never having had the correct premise. Accordingly, the assertion of Appellee that the Disclaimer was in no wise necessary to save any claim, still stands unimpeached by the Appellants.

Appellants point out and refer to parts of the specification of the "Caustic Soda" patent, and endeavor from the language therein italicized to convince the Court that the said terminology defined chemically isolated protein (p. 46, Reply Brief). Much evidence was introduced to show the difference between chemically isolated protein and mill extracted protein. Chemically isolated protein is a chemical product. The protein, obtained by a chemical process, is chemically pure. Mill extracted protein is a mechanical milling process by which a certain percentage of the soya bean material is eliminated, and the resultant flour is thereby made to contain a higher percentage of protein content than previous to the milling. The distinction between these two resultant products was by the evidence shown to be very clear. Isolation is one thing, and extraction is another,—the former a chemical process, the latter a mechanical process. The Trial Court in the extract quoted (R. 122; p. 46 Reply Brief) was referring to chemically isolated protein, not to mill extracted protein.

The point remains, that a patentee may describe the *earth* in his specification, and only claim one acre in his claims, and his monopoly grant will comprise merely the one acre. So here, it is submitted, it is wholly immaterial what part of the specification, prior to the claims, was stricken out. The cases all lay the emphasis on the point that the statute relating to costs in connection with a disclaimer, require the cancellation of a claim to save the patent. Such cancellation was not done in the instant case (R. 94, 98). As stated before, the Appellants nowhere pointed out that the Disclaimer disclaimed any *claim*. The fact that no claim was disclaimed emphasizes that the only reason for introducing the Disclaimer was, as stated to the Court, to save time relating to a construction that was not contended for by the Appellee.

It will be remembered that a supplemental transcript of the record as to additional statement of evidence and exhibits was offered by the Appellee at the time of the argument. Under the rules of this Court this Court would have the right to permit or direct the certification of this supplemental transcript of the record if in the opinion of the Court such supplemental transcript of record was necessary. In this supplemental transcript of record is contained the statement by Mr. Arnold and Mr. Ogden, read into the record at the time of the trial and at the time the

disclaimers were offered, and which in the opinion of the Appellee would be very helpful to this Court in giving this Court the same viewpoint of the record as was had by the Trial Court. This supplemental record also contains evidence and formulae to show that the record disclosed that all the formulae for the manufacture of soya bean glues introduced into the record as being glues manufactured by the Appellee embodied equivalent ingredients in such formulae as would make them all come under the teachings of the "Johnson" patent as to the chemicals there used.

As we have heretofore stated, the "Caustic Soda" and "Carbon Bisulphide" patents are subsidiary to the "Johnson" patent to the extent that they use soya bean flour as their glue base. The chemicals, caustic soda and/or carbon bisulphide, were added to the "Johnson" formulae, i. e., soya bean flour, plus sodium fluoride and lime or their equivalents. We also believe that this record would be useful to this Court in order that this Court might have before it the same evidence that the Trial Court had, showing the use of carbon bisulphide and caustic soda being chemicals added to the soya bean glue base, plus the chemicals or their equivalents used by Johnson. We, therefore, respectfully urge this Court that the supplemental transcript of record be ordered certified and become a part of this record on appeal.

14. Reply to Contention of Appellants Respecting "No Proof of Wrongful Intent Necessary" (p. 49, Reply Brief).

Most of the argument of counsel here involved has been answered in our Second Answering Brief in Cause No. 7083, and in the argument set forth in the first part of this Brief. We will only direct the Court's attention to certain statements of Appellants which we feel are unjustified by the record.

Appellants state (p. 52, Reply Brief):

"Appellee made no attempt to establish that glues could not be made from soya bean flour without infringing Claims 3 and 7 of the Johnson Patent. The evidence proved just the contrary. While Kaseno Products Co. had actually made an infringing glue prior to the time suit was started, as found by the Trial Court, the evidence does not show that Kaseno Products Co. made any such infringing glue after suit was commenced."

This is merely a restatement of the contention of Appellants throughout their Opening and Reply Briefs. In our Second Answering Brief in Cause No. 7083, we have set out at length each and every formula disclosed in the record as having been used by the Kaseno Products Co. We have there shown by the undisputed evidence of Mr. Wood, one of the chemical experts of the Appellants in the Trial Court, and we have also shown by the testimony of Mr. Laucks, that every one of the formulae used by Ka-

seno Products Co. did contain soya bean flour as the glue base, and did contain chemicals, either sodium fluoride and lime or their equivalents. How can Appellants make the statement they here make, in view of the positive testimony of Mr. Wood which stands uncontradicted in the record and is the testimony of their own witness used in support of their contention relative to anticipation as set forth in their answer? We have shown that the testimony of Mr. Laucks in no wise contradicts Mr. Wood's testimony with regard to equivalents, but dove-tails in and supports it.

There is only one possible theory upon which this character of statement can be based, and that is that the Appellants absolutely ignore the existence of the doctrine of equivalency as applied to patents. If one is to give effect to the doctrine of equivalency, and we have quoted from Walker on Patents heretofore in our Second Answering Brief in Cause No. 7083, showing the important place that the doctrine of equivalency occupies in the patent art, then there is not even a semblance of foundation in fact for this statement of Appellants. We have shown that two of the formulae set forth in our Second Answering Brief in Cause No. 7083 were the formulae of glues concerning which defendant Linquist testified (R. 209):

“We are now making two soya bean glues, and we denote them as No. 26 glue and No. 3355 glue.”

Note the witness says, at the time of trial, "we are now making two soya bean glues", and we have shown by the formulae of these two glues that they used chemicals which are the equivalents of sodium fluoride and lime, plus soya bean flour, plus water, such as used by "Johnson" in Claims 3 and 7 of the "Johnson" patent.

On such unsound and unfounded contention of Appellants as set forth in the quoted paragraph they then proceed to build up the remaining portion of their argument. If this Court recognizes the doctrine of equivalency, then all the subsequent argument of Appellants falls. Appellants admit that they intended the soya bean flour by them sold to be used by the Kaseno Products Co. in the making of soya bean glues, the making of which soya bean glues has been found by the Trial Court to be wrongful and tortious; and having had the general intent to commit the wrongful act, they committed such wrongful act as to every glue manufactured by the Kaseno Products Co. which contained soya bean flour as its glue base.

Appellants persist with their apparent misconception, intentionally or otherwise, as to the function of caustic soda as taught in the "Caustic Soda" patent. For instance, they say (p. 54, Reply Brief) that the statements contained in our Answering Brief as

to the doctrine of equivalency are not correct and "are not in accord with a positive finding of the Trial Court." They then quote the Trial Court (p. 55, Reply Brief):

"Aside from the presumption of validity of the patent in suit and from the presumption arising from *the fact that the caustic soda glues drove out the double decomposition glues of Johnson*, the foregoing shows that Johnson did not anticipate the patent in suit in this respect." (Appellants' italics.)

Just how the Appellants would have this Court believe that such finding by the Trial Court repudiates the statements made by Appellee in its opening brief with regard to the doctrine of equivalency, is quite beyond our understanding. Appellants overlook the fact that a patent may be subsidiary in character. Of course the Trial Court found that the use of caustic soda was not anticipated by the "Johnson" patent. The "Johnson" patent taught broadly the use of the residue of soya bean, finely ground, as a glue base, together with well known chemicals such as sodium fluoride and lime, or their equivalents. "Johnson" nowhere taught the use of caustic soda as such used in a glue composition. Therefore, Appellee being the owner of the "Johnson" patent, and the owner of the "Caustic Soda" patent, could use the soya bean base of "Johnson", plus the chemicals of "Johnson", and add thereto caustic soda, and when

this caustic soda was so added the caustic soda glues did then drive out of the market, as stated by the Trial Court, the glues of the "Johnson" patent. And why not? Reference to the charts contained on pages 19 and 20 of our Answering Brief make this situation very clear.

Appellants make the further statement (p. 55, Reply Brief):

"Caustic soda, as such, instead of being added to the double decomposition glue taught by Johnson, is used in place of the double decomposition chemicals he taught."

It will be noted that Appellants cite no record in support of this statement. It is merely the conclusion of the writer of the Brief. The very formulae to which we have made reference in our Second Answering Brief in Cause No. 7083, show that the two glues which the Kaseno Products Co. "are now making" and with which caustic soda is used, contain the soya bean base of "Johnson" plus the double decomposition chemicals of "Johnson" or their equivalents, plus caustic soda as such, and thus were constituted the two glues which the Kaseno Products Co. admits it was making at the time of trial. Appellants cite no law holding that a composition of matter cannot infringe two patents. There is no such law. And yet the Appellants say (p. 55, Reply Brief):

“There is no foundation, in truth or in fact, for the statement made by Appellee that every glue made by Kaseno Products Co. infringed claims 3 and 7 of the Johnson Patent.”

All we have to say with regard to the presence or absence of truth is for the Court to look at the formulae themselves and, in the light of the uncontradicted evidence in this case, apply the doctrine of equivalency and see where the truth does lie. To call black white and to accuse another of falsifying because he says black is black, does not constitute argument. It merely constitutes accusation. Cases are not won on accusations but on argument and fact.

Appellants make the following statement (p. 61, Reply Brief):

“The use of caustic soda and carbon bisulphide by Kaseno Products Co. is not a result which would proximately follow the furnishing of the flour. The making of an infringing glue would not proximately follow the furnishing of the flour. The making of a non-infringing glue would so follow.”

This argument is so fallacious and so illogical and unsound as to scarcely merit answer. When the doctrine of equivalency is recognized, then the record in this case will show that every formula, under which glue was manufactured, would constitute an infringement of one or more of the three patents in suit. This is not an expression of opinion. The formulae speak

for themselves. The ingredients of the formulae have been testified to. They are set up in the record. The testimony is present in the record. Apply the testimony relating to equivalency to the formulae, and you have the result. The Court does not need to depend upon any argument of counsel.

These things being true, how can Appellants contend that the making of a non-infringing glue would proximately follow the furnishing of the soya bean flour for glue-making purposes; and especially how can they say this when the use of soya bean flour as a glue base is an infringement of the "Johnson" patent, no matter what chemicals may be used with it? And it must be remembered that there is no holding of invalidity as to a single claim in suit of the "Johnson" patent.

15. Reply to Contention of Appellants Respecting "Duty Was Upon Appellants to Determine Whether Kaseno Products Co. Was Licensed Under the Patents" (p. 61, Reply Brief).

It was the position of Appellee in its Answering Briefs, and is the position taken in these Second Answering Briefs, that the institution of the "Johnson" suit by the filing and serving of the Bill of Complaint in which the Appellants were charged with contributory infringement, did constitute notice. Appellants say that the filing of such a Bill of Complaint

constitutes no notice whatsoever. It is difficult to answer with patience such an argument. Suffice it to say that Appellee directs the attention of this Court to the fact that the Bill of Complaint in the "Johnson" case did charge the Appellants with contributory infringement. Suffice it to say that the Appellants were given notice of the issuance of the "Caustic Soda" and "Carbon Bisulphide" patents. We believe that this did charge them with notice. We believe that under the authorities cited in our First Answering Briefs that they were then placed in position of acting at their peril if they continued to furnish soya bean flour for glue-making purposes to the Kaseno Products Co. for the manufacture of glue, and that it was Appellants' duty to have known whether or not the Kaseno Products Co. was using the flour so furnished by the Appellants to it in an unlawful manner. The authorities which we cited remain unanswered, and are as we believe, then and now absolutely in point on the facts as disclosed by the record in this case.

IV. CONCLUSION.

We respectfully submit to this Court:

1. That the Kaseno Products Co. has now been judicially determined to have been at all times since

using soya bean flour as a glue base, an infringer of Claims 3 and 7 of the "Johnson" patent.

2. That the Trial Court found that no claim in suit of the "Johnson" patent was anticipated.

3. That the Trial Court found that the Appellants sold soya bean flour to the Kaseno Products Co. with the intent that the same be used in the manufacture by the Kaseno Products Co. of the products of Appellee's inventions. These inventions were three in number:

(a) "Johnson", teaching broadly the use of the residue of the whole soya bean, finely ground, as a new adhesive base;

(b) The "Caustic Soda" teaching broadly the use of soya bean flour plus caustic soda as such in a resultant glue;

(c) The "Carbon Bisulphide" teaching broadly the use of soya bean flour in a glue base, plus carbon bisulphide.

In all three of these the presence of water is presumed. These are the products of Appellee's inventions as referred to by the Trial Court. (Note well the "Caustic Soda" and "Carbon Bisulphide" patents are not limited in scope to soya bean as the base, but same is not material to contentions now presently before the Court.)

4. That the Appellants themselves, on page 36 of their Reply Brief, have admitted the presence of their intent to have sold to the Kaseno Products Co. soya bean flour for use in the manufacture by their co-defendants of Appellee's inventions, i. e., the use of soya bean flour as a glue base in a resultant glue.

5. That inasmuch as the Kaseno Products Co.'s use of soya bean flour as a glue base has been found to be tortious and wrongful in that every formula by it used, as disclosed by the record, would have infringed Claims 3 and 7 of the "Johnson" patent; therefore, every ton of soya bean flour furnished to the Kaseno Products Co. by the Appellants with the intent that the same should be used in the manufacture of a soya bean glue, constituted a wrongful and tortious act on the part of the Appellants, or the direct aiding, assisting and contributing to the performance of a wrongful and tortious act.

6. That the soya bean flour so furnished by the Appellants to the Kaseno Products Co. constituted from 52 to 96 per cent. of the entire glue base, and therefore constituted the furnishing of the distinguishing fundamental element of the patented invention of "Johnson".

7. That Kaseno Products Co. did manufacture glues using caustic soda and carbon bisulphide. That the soya bean flour employed by them in so doing was furnished by the Appellants.

8. That the Appellants, having had the intent broadly to aid and abet in the wrongful, tortious and infringing acts of the Kaseno Products Co., must now be held guilty of contributory infringement of the three patents in suit, unless they have shown the Court some avenue of escape open to them by affirmative proof on their part.

9. That the Appellants having initially had the intent broadly to aid and abet, and make possible, for the Kaseno Products Co. to manufacture the products of Appellee's inventions, by supplying the distinguishing, fundamental element, i. e., the glue base, the burden of showing that they are not guilty of the more specific offense, namely, the infringement of Claims 2, 4, 6 and 8 of the "Caustic Soda" patent and Claims 13 and 14 of the "Carbon Bisulphide" patent, which embodied the use of said base, rested squarely upon the shoulders of the Appellants. This burden they have not met.

10. That the Assignments of Error 12, 13 and 14, upon which the Appellants rely, are not sufficiently specific to permit the specifications of error contained

in their Opening Brief under Sub-Division "G" thereof, and therefore that portion of Appellants' Brief should not be considered.

11. That except for any evidence entered in the cause prior to the resting of Appellee's case in chief, at which time the motion for non-suit on behalf of Appellants was made, and save only the questions preserved in the Assignments of Error as to the admission and relevancy of the Arabol letters and the Stipulation, no other questions of fact are now open to the Appellants in this cause.

12. That the Appellants have failed to cite one single authority showing that costs should be denied in any case where a Disclaimer has been filed, which Disclaimer does not actually disclaim some claim of the patent. No claim of the "Caustic Soda" patent having been disclaimed, judgment for costs should stand.

13. That the question of Disclaimer does not enter into the "Carbon Bisulphide" patent. That there has been no attempt on the part of the Appellants to segregate the costs as to the "Carbon Bisulphide" patent, "Caustic Soda" patent or the "Johnson" patent, and that in any event, as to the "Carbon Bisulphide" patent costs against the Appellants must stand.

For the reasons here set forth, we respectfully submit that the judgment of the Trial Court should be affirmed.

Respectfully submitted,

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